Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

KEITH B. WASHINGTON,
STAFF SERGEANT,
UNITED STATES MARINE CORPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the failure to properly swear a witness in a criminal trial is constitutional error for the purposes of applying a harmless-beyond-a-reasonable-doubt test for prejudice in the absence of a timely objection.

Whether the Confrontation Clause and *Maryland v. Craig*, 497 U.S. 836 (1990) require child witnesses to be made aware of the penalties of false testimony before testifying.

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IN THE SUPREME COURT OF THE UNITED STATES

Keith B. Washington, Staff Sergeant, United States Marine Corps, Petitioner,

v.

United States of America, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Staff Sergeant Keith B. Washington, United States Marine Corps, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces in this case is published at 63 M.J. 418 (C.A.A.F. 2006). App. A, *infra*, at 1a. The second opinion of the Navy-Marine Corps Court of Criminal Appeals is published at 61 M.J. 574 (N-M. Ct. Crim. App. 2005). App. B, *infra*, at 18a.

JURISDICTION

The Court of Appeals for the Armed Forces granted Petitioner's petition for review under 10 U.S.C. § 867(a)(3)(2000) and entered judgment in this case on August 9, 2006. This Court has jurisdiction to review this

case under 28 U.S.C. § 1259(3)(2006).

CONSTITUTIONAL PROVISION INVOLVED

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

U.S. CONST. amend. VI.

STATEMENT OF THE CASE

This case raises two important, recurring questions regarding the applicability of the Confrontation Clause of the Sixth Amendment to unsworn testimony, namely: 1) whether the government bears the burden to prove an error admitting unsworn testimony is harmless beyond a reasonable doubt, and 2) child witnesses should be compelled to acknowledge negative consequences for untruthful testimony before being permitted to testify.

Petitioner was charged with one specification of carnal knowledge and one specification of committing an indecent act in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C §§ 920 and 934 (2000). A general court-martial, composed of members with enlisted representation, tried Petitioner on March 22, April 17-19, and June 26-30, 2000.

The military judge permitted the primary witness against Petitioner to testify regarding the substance of the allegations without having first been sworn. Trial counsel's examination of ten-year-old Chemise Burden began with five preliminary questions about the nature of truth and lying:

Q (Trial Counsel): Do you know what the truth is?
A (Chemise Burden): Yes.
Q: What is the truth?
A: Telling what really happened.
Q: If I told you – what is a lie? Do you know what a lie is? Tell me what a lie is?
A: Not telling the truth.
Q: Not telling the truth. So if I told you the sky was purple right now, what would that be?
A: A lie.
Q: That would be a lie, right?
A: (No response.)

(Record at 254.) After being admonished by the military judge for standing too close to the witness, trial counsel then asked Chemise Burden a series of substantive questions about the allegations against Petitioner *without* eliciting a promise to be truthful or an acknowledgement that untruthful testimony would yield negative repercussions. (Record at 254-55.)

At the conclusion of the government's direct examination of Chemise Burden, trial counsel again went through a litany of questions pertaining to truthfulness with Chemise Burden:

Q: Why did you say what you said today?
A: Telling the truth.
Q: You swore that everything you said today was the truth, correct?
A: Yes.

(Record at. 263.) The trial counsel then addressed the court, stating: "Nothing further, Your Honor. The only thing, sir, if

you require me to swear her in, I will. I think we have pretty much covered it, sir. I didn't officially do it." (Record at 263.) The trial counsel then concluded his direct examination of Chemise Burden with the following set of questions:

> Q: Chemise, your testimony today, was it the truth?
> A: Yes.
> Q: Was it the whole truth?
> A: Yes.
> Q: Was it nothing but the truth?
> A: Yes.
> Q: So help you God?
> A: Yes.

(Record at 264.)

The government recalled Miss Burden to testify the following day. (Record at 399.) Having properly sworn her, trial counsel proceeded to again examine Chemise Burden about her allegations against Petitioner. (Record at 400-402.) After the direct examination of Miss Burden, the defense's cross examination, examination by the military judge and members, and redirect examination, the military judge addressed the witness:

> Q (Military Judge): Chemise, in case we didn't have you formally stand up and raise your hand and take the oath like you did this morning...Do you recall that?
> A (Chemise Burden): Yes, sir.
> Q: The Captain asked you some questions yesterday to make sure that you understood

that it was important for you to tell the truth. Do you recall that?
A: Yes, sir.
Q: Do you recall the testimony that you gave yesterday?
A: Yes, sir.
Q: Did you tell both these gentlemen the truth yesterday?
A: Yes, sir.

(Record at 405.)

On the first day of her testimony, which was unsworn, Chemise Burden testified about several topics that were not readdressed the following day under oath. Specifically, Chemise Burden explained that she understood the difference between male "private parts" and female "private parts." (Record at 257.) The witness testified that she was "scared." (Record at 258.) She testified that Petitioner ejaculated on her stomach and cleaned it up with a rag. (Record at 259.) She testified that Petitioner came in and got under the covers and that he started to rub on her. (Record at 262.)

Additionally, on redirect, when she still had not been sworn, Chemise Burden testified that none of the adults with which she discussed the allegations told her to lie, that she had made consistent statements to other adults prior to trial, and that she had disclosed these allegations to her mother without being prompted. (Record at 269-70.) Chemise Burden also further testified on redirect regarding the ensuing argument between her parents on June 27, 1998 and the long ride down to Georgia with her siblings. (Record at 273.)

None of these facts were repeated to the members in her subsequent sworn testimony.

The members found Petitioner guilty, contrary to his

pleas, of both specifications using exceptions and substitutions and sentenced him to nine years confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) reviewed Petitioner's case pursuant to Article 66(b)(1), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1) (2000). On May 18, 2005, NMCCA affirmed the findings and sentence in a published opinion. Petitioner filed with the Court of Appeals for the Armed Forces (CAAF) a petition for grant of review of NMCCA's decision on August 2, 2005. On January 20, 2006, CAAF granted review of Petititoner's case pursuant to Article 67(a)(3), Uniform Code of Military Justice, 10 U.S.C. § 867(a)(3) (2000) of the following issue:

> Whether the lower court erred when it ruled that a military judge may administer an oath of truthful testimony to a child after the testimony is complete.

CAAF held that "[t]here is no doubt that the failure to administer the oath before C.B.'s testimony was error, and that the error was obvious." *Washington*, 63 M.J. at 424. Nonetheless, CAAF found that "Appellant's claim fails because he cannot show he was materially prejudiced by the error." *Id.*

REASONS FOR GRANTING THE PETITION

Issue I

Whether the failure to properly swear a witness in a criminal trial is constitutional error for the purposes of applying a harmless-beyond-a-reasonable-doubt test for prejudice in the absence of a timely objection.

Whether the proper administration of the oath implicates the Confrontation Clause of the Sixth Amendment and should be reviewed for harmlessness beyond a reasonable doubt is a frequently recurring question and, in light of the decisions of this Court, is routinely answered incorrectly by the circuit courts.

Proper administration of the oath is a vital component of the right to confrontation. In *Maryland v. Craig*, this Court confirmed that testimony under oath implicated the Confrontation Clause of the Sixth Amendment:

> ...[T]he right guaranteed by the Confrontation Clause includes not only a "personal examination" but also [among other things] "insures that the witness will give his statements under oath – thus impressing with him the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury...."

497 U.S. 836, 845-46 (1990)(quoting *Mattox v. United States*, 156 U.S. 237, 242 (1895) and *California v. Green*, 399 U.S. 149, 158 (1970).). Although the *Craig* Court later

found that Maryland's use of remote closed-circuit child testimony did not violate the Confrontation Clause, the Court relied heavily upon the system's preservation of various other facets of "the confrontation right," including the requirements that "[t]he child witness must be competent to testify and must testify under oath." *Craig*, 497 U.S. at 851.

This Court has also held that violation of the Confrontation Clause should be reviewed by appellate courts using a harmless-error-beyond-a-reasonable-doubt test. *See Chapman v. California*, 386 U.S. 18, 24, 26 (1967); *See also*: *Harrington v. California*, 395 U.S. 250 (1969); *Schneble v. Florida*, 405 U.S. 427 (1972); *Coy v. Iowa*, 487 U.S. 1012, 1021-22 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Arizona v. Fulminante*, 499 U.S. 279, 295 (1991.)

With constitutional errors, such as violations of an accused's right to confrontation, the burden does not belong to the petitioner. Errors "admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot...be conceived of as harmless." *Chapman*, 368 U.S. at 23-24 (citing *Fahy v. Connecticut*, 375 U.S. 85 (1963)). The test for evidence admitted in violation of the Confrontation Clause is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction. *Fahy*, 375 U.S. at 86-87. "The burden of proving the error's harmlessness falls 'to someone other than the person prejudiced by it.'" *Gutierrez v. McGinnis*, 389 F.3d 300, 303 (2nd Cir. 2004)(quoting *Chapman*, 386 U.S. at 24.)

In the present case, CAAF, having conceded that the trial court's failure to properly administer the oath was error, applied the wrong test for prejudice. Instead of testing for harmlessness beyond a reasonable doubt, CAAF placed the

burden upon Petitioner to show that the error materially prejudiced his substantial rights. *See Washington*, 63 M.J. at 424-25.

Despite this Court's holdings that Confrontation Clause violations ought to be reviewed for harmlessness beyond a reasonable doubt, other federal circuit courts, like CAAF, continue to improperly place the burden of showing prejudice upon the accused and do not review this violation of the Confrontation Clause for harmlessness beyond a reasonable doubt. *See United States v. Odom*, 736 F.2d 104, 115-116 (4th Cir. 1984). *See also*: *Wilcoxon v. United States*, 231 F.2d 384, 387-88 (10th Cir. 1956) and *Beausoleil v. United States*, 107 F.2d 292, 294 (D.C. Cir. 1939.)

CAAF failed to reconcile its decision in Petitioner's case with this Court's decisions in *Chapman*, *Green*, or *Craig*. The other circuits' decisions seem similarly inconsonant with this Court's Confrontation Clause jurisprudence.

Issue II

Whether the Confrontation Clause and *Maryland v. Craig*, 497 U.S. 836 (1990) require child witnesses to be made aware of the penalties of false testimony before testifying.

The Court should grant review of this issue as CAAF's decision in Petitioner's case has created a split in the circuits. Specifically, CAAF held that, "in the case of children,...oaths and affirmations may be specifically tailored to impress on the particular child the importance of telling the truth. This can be accomplished, as it has been accomplished for many years, without imparting to the child the perils of perjury." *Washington*, 63 M.J. at 425. CAAF's

declaration that children may be sworn without first demonstrating a concomitant duty to tell the truth under some threat of penalty is contrary to this Court's Confrontation Clause jurisprudence and the decisions of the other circuits regarding the essential components of an oath.

By compelling truthful testimony, the oath impacts the reliability of the trial's outcome. In *United States v. Dunnigan*, 507 U.S. 87 (1993), this Court, in upholding the constitutionality of a sentence enhancement provision for perjury, highlighted the importance of sworn testimony, delivered under oath and threat of punishment. Specifically, the *Dunnigan* Court held, "The requirement of sworn testimony, backed by punishment for perjury, is as much a protection for the accused as it is a threat. All testimony, from third-party witnesses and the accused, has greater value because of the witness' oath and the obligations or penalties attendant to it." *Dunnigan*, 507 U.S. at 97.

This Court has placed a great deal of emphasis upon the importance of oaths and has provided the rationale for administering oaths to witnesses before testifying: 1) to impress upon witnesses the solemnity of the proceeding in order to ensure truthful testimony and 2) to alert the witness that any testimony provided must be truthful under the threat of prosecution for perjury. *Green*, 399 U.S. at 158.

Other circuits have affirmed this second component requiring the imposition of some duty to tell the truth. *See United States v. Zizzo*, 120 F.3d 1338 (7th Cir. 1997)("The idea behind [the oath requirement] is to preserve the integrity of the judicial process by awakening the witness' conscience and making the witness amenable to perjury prosecution if he fibs."); *See also United States v. Bueno-Vargas*, 383 F.3d 1104, 1110-1111 (9th Cir. 2004)(quoting *United States v. Turner*, 558 F.2d 46, 50 (2nd Cir. 1977) and *State v. Tye*, 636

N.W.2d 473, 478 (Wis. 2001).) In *Bueno-Vargas*, the Second Circuit held that the "'true test' for whether a declaration is made under oath or affirmation 'is whether the procedures followed were such that perjury could be charged therein if any material allegation contained therein is false.'" *Bueno-Vargas*, 383 F.3d at 1111 (quoting 2 Wayne R. LaFave, *Search and Seizure*, § 4.3(e), at 474-75 (3d ed. 1996).) The Tenth Circuit declared in *Wilcoxon* that "[t]he two-fold purpose of the oath is to bind the conscience of the witness and make him amenable to prosecution if he gives perjured testimony." 231 F.2d, at 387.

CAAF, however, has discarded the second component of this test with regard to child witnesses, requiring no imposition of a sense of obligation upon the witness before testifying. CAAF's abandonment of the "duty" requirement contradicts this Court's jurisprudence that confrontation requires the proper administration of the oath, even to children, and that proper administration of the oath requires an imposition of a sense of obligation or "duty" to tell the truth under the threat of punishment. This abandonment has split the CAAF from the other circuits and from this Court.

This Honorable Court should settle this question.

CONCLUSION

Failure to properly administer the oath implicates the Confrontation Clause of the Sixth Amendment. Accordingly, appellate courts should consider the failure to properly swear a witness an error of constitutional magnitude, where the government carries the burden of proving harmlessness beyond a reasonable doubt. Further, this Court should recognize and confirm the practical effect the oath plays in the garnering truthful testimony and, ensure that, with regard

to child witnesses, all of the necessary components of the oath are present, particularly an acknowledgement that untruthful testimony carries with it negative repercussions. For these two reasons, Petitioner's petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES, Appellee v. Keith B. WASHINGTON, Staff Sergeant U. S. Marine Corps, Appellant

No. 05-0650

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

63 M.J. 418; 2006 CAAF LEXIS 1060

April 19, 2006, Argued
August 9, 2006, Decided

PRIOR HISTORY: [**1] Crim. App. No. 200101011. Military Judge: A. W. Keller. *United States v. Washington, 61 M.J. 574, 2005 CCA LEXIS 162 (N-M.C.C.A., 2005)*

DISPOSITION: The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

COUNSEL: For Appellant: Lieutenant Richard H. McWilliams , JAGC, USNR (argued); Captain James Valentine, USMC, and Lieutenant Commander Jason S. Grover, JAGC, USN (on brief).

For Appellee: Lieutenant Mark H. Herrington, JAGC, USNR (argued); Commander Charles N. Purnell, JAGC, USN (on brief); Lieutenant Kathleen A. Helmann, JAGC, USNR.

JUDGES: BAKER, J., delivered the opinion of the Court, in which GIERKE, C.J., and CRAWFORD, EFFRON, and ERDMANN, JJ., joined.

OPINION BY: BAKER

OPINION:

[*419] Judge BAKER delivered the opinion of the Court.

Appellant was a Marine Corps staff sergeant stationed at the Marine Corps Air Station in Cherry Point, North Carolina. Contrary to his pleas, after a contested general court-martial before members, he was convicted of carnal knowledge and indecent acts with a child, in violation of Articles 120 and 134, Uniform Code of Military Justice (UCMJ), *10 U.S.C. § § 920, 934 (2000)*. He was sentenced to a bad-conduct [**2] discharge, confinement for nine years and reduction to pay grade E-1. The convening authority approved the adjudged sentence. The United States Navy-Marine Corps Court of Criminal Appeals affirmed. *United States v. Washington, 61 M.J. 574, 578 (N-M. Ct. Crim. App. 2005)*. Upon Appellant's petition, we granted review of the following two issues:

I. WHETHER LEGALLY SUFFICIENT EVIDENCE WAS PRESENTED TO PROVE THE OFFENSE OF CARNAL KNOWLEDGE.

II. WHETHER THE LOWER COURT ERRED WHEN IT RULED THAT A MILITARY JUDGE MAY ADMINISTER AN OATH OF TRUTHFUL TESTIMONY TO A CHILD AFTER THE TESTIMONY IS COMPLETE.

On Issue I, viewing the evidence in the light most favorable to the prosecution, we conclude that the evidence was legally sufficient. On Issue II, we conclude that in the context of this case, Appellant was not materially [*420] prejudiced by the failure to administer the oath in light of the corrective action taken. As a result, we affirm the decision of the United States Navy-Marine Corps Court of Criminal Appeals.

BACKGROUND

At the time of the alleged offenses, Appellant and his wife, Krystal, lived in on-base housing along with their triplets, age five, [**3] and their daughter, C.B., age eight. At Appellant's court-martial, Krystal testified that around 9:30 a.m. on June 27, 1998, she left the house to buy breakfast for the family at Hardee's. She returned home a little before 10:00 a.m., and soon afterwards, made arrangements to drive her mother to Georgia. Krystal intended to drive and spend the night in Georgia with her mother and a friend, leave the children with Appellant, and return home the following day. She discussed child care arrangements with Appellant, and told C.B. to take a bath. When Krystal and her mother left the house at about 10:30 a.m., Appellant was in bed wearing basketball shorts.

Krystal testified that not long after leaving the house, she realized she forgot to pack a particular dress. She returned home and tried to open the screen door. The screen door was generally left unlocked, but upon her return, she found it

locked. She tapped on the window of the triplets' room, and all three came to the door and opened it. Krystal asked where C.B. was, and the children told her she was "in the room with daddy." Krystal walked into her bedroom to get the dress and saw Appellant and C.B. in bed together.

Krystal testified [**4] that she became angry because she believed C.B. had ignored her demand to take a bath. She asked C.B., "[d]idn't I tell you to take a bath?" When C.B. tried to get out of bed, Appellant grabbed her and said, "[l]eave the girl alone. She's just laying here." Krystal and Appellant began to argue, and when Appellant continued to not let C.B. out of bed, Krystal pulled hard on the bed covers. Before Appellant could pull the covers back up, Krystal saw that he and C.B. were "spooned into each other." C.B.'s underwear and shorts were at the foot of the bed, and Appellant was totally naked. Krystal testified that Appellant had a partial erection in that "about-to-lose-it stage." She attempted to call the police, but Appellant disconnected the phone and tried to restrain her, telling her she was not going to "leave the house thinking that's what [she had seen]." Krystal hurriedly ordered all four children, still in their night clothes and without shoes, into her car and drove them six to eight hours to Georgia.

DISCUSSION

A. Sufficiency of the Evidence

Appellant first challenges his conviction on the ground that there was insufficient evidence to prove he committed carnal knowledge [**5] on June 27, 1998. He argues the offense of carnal knowledge requires proof of sexual penetration, and the Government failed to introduce legally sufficient evidence showing he engaged in an act of sexual intercourse with C.B.

An *Article 120(b)*, UCMJ, violation for carnal knowledge requires: (1) that the accused commit an act of sexual intercourse; (2) with a person who is not the accused's spouse; and (3) who is under sixteen years old. "Penetration, however slight, is sufficient to complete" the offense. *Article 120(c)*, UCMJ.

When determining whether the evidence was legally sufficient to show an act of sexual intercourse on June 27, we "'view[] the evidence in the light most favorable to the prosecution'" and decide whether "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Brown, 55 M.J. 375, 385 (C.A.A.F. 2001)* (quoting *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*); *United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987)*.

At the court-martial, the specification for carnal knowledge alleged that Appellant, did "on divers occasions, between on or [**6] about 15 April 1998 and 27 June 1998, commit the offense of carnal knowledge with [C.B.], a [*421] child under the age of 12." In light of Krystal's testimony about discovering her husband naked in bed with C.B. on June 27, the Government's case focused on the events of that day. The members found Appellant guilty of carnal knowledge on June 27, but they did not find he committed the offense on prior divers occasions. Appellant's central argument is that although C.B. testified about acts of vaginal penetration prior to June 27, the members found him not guilty of those acts, and therefore those same acts could not be considered by either the members or the Navy-Marine Corps Court of Criminal Appeals when determining whether he committed carnal knowledge on June 27. He argues that without the prior acts evidence, there is insufficient evidence showing vaginal penetration occurred on June 27.

For the reasons stated below, we disagree. First, the Government offered some evidence showing vaginal penetration occurred on June 27. Second, in light of the different standards necessary to convict, as opposed to admit, other acts evidence, the members and the lower court might appropriately consider [**7] evidence of those prior divers acts for which Appellant was found not guilty.

Evidence Referring to Events on June 27

On the first day of her testimony, C.B. nodded affirmatively when the Government asked whether Appellant had "touched [her] private parts with his private part more than once." She testified, without reference to any specific day, that Appellant put his private part "inside [her] private part," and that "white stuff" came out of his private part on her belly. She also testified about the specific events on June 27, and stated that after her mother left for Georgia, she sat on her parents' bed to watch television. After Appellant came in, he took off their shorts, they got under the covers and "he started rubbing on [her]."

The following day, the Government recalled C.B. She reiterated her earlier testimony and also stated that the penetration did not hurt because it was partial. Trial counsel elicited the following testimony:

> Q. But he did put his private part in your private part, right?
>
> A. Yes.
>
> Q. Why didn't it hurt?
>
> A. I don't know.

Q. You don't know? Did it go all the way inside you?

A. No.

Q. Did it go inside [**8] you though?

A. Yes.

. . . .

Q. Do you remember we talked about the one incident that your mother walked in on you, right?

A. Yes.

. . . .

Q. Did your daddy touch you times before that, right?

A. Yes.

Q. Did he also put his private part inside your private part before that?

A. Yes.

Emphasis added. It is clear from this exchange that trial counsel asked C.B. questions pertaining specifically to vaginal penetration. Immediately on the heel of those questions, trial counsel asked whether Appellant "also put his private part inside [her] private part before" June 27.

(emphasis added). For sure, this testimony is subject to more than one interpretation; however, viewing the testimony in the light most favorable to the Government, a reasonable trier of fact could infer that the word "also" was inclusive, and meant that acts of penetration occurred not only before June 27, but also on June 27.

Evidence of Prior Acts

Appellant also argues that because the members found him not guilty of carnal knowledge on divers occasions before June 27, the Court of Criminal Appeals erred in relying on evidence regarding those divers acts [**9] in upholding the factual and legal sufficiency [*422] of the charge to carnal knowledge on June 27. n1

n1 In addressing legal and factual sufficiency, the Criminal Court of Appeals opinion states inter alia:

> A careful reading of the record of trial discloses that sufficient evidence of each and every element of both offenses was presented to the members through testimony and other evidence adduced at trial. C.B. testified that the appellant had touched her "private parts" on more than one occasion prior to, or on the morning of, the alleged incident. *Washington, 61 M.J. at 577.*

Appellant's argument that those other acts cannot be considered fails for two related reasons. First, the

admissibility of other acts evidence is governed by the Military Rules of Evidence (M.R.E.), and not by the members' verdict. Second, Appellant is arguing, in essence, that a finding of not guilty amounts to a finding of fact -- in this case a finding that C.B.'s other acts testimony was false. However, a [**10] finding of not guilty is not a finding of fact, but a determination that the government has not proved all the elements of the charged offense beyond a reasonable doubt. *United States v. Watts, 519 U.S. 148, 155, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997)*; see also *Dowling v. United States, 493 U.S. 342, 348, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990)*.

Moreover, with respect to other acts evidence involving child molestation and sexual assault, M.R.E. 413 and M.R.E. 414 are "intended to provide for more liberal admissibility of character evidence in criminal cases." Manual for Courts-Martial, United States, Analysis of the Military Rules of Evidence app. 22 at A22-36 to A22-37 (2005 ed.) [hereinafter Drafters' Analysis]. Specifically, M.R.E. 414(a) provides that "[i]n a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant."

Before a court may submit evidence of prior charged or uncharged acts to a jury, it must examine "the evidence in the case and decide[] whether the jury could reasonably find the conditional [**11] fact . . . by a preponderance of the evidence." *United States v. Huddleston, 485 U.S. 681, 690, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988)*; *Dowling, 493 U.S. at 348-50*. This Court in *United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989)*, while not citing Huddleston, set forth a "three-prong test [] consistent with Huddleston" to govern the admissibility of other acts evidence. *United States*

v. McDonald, 59 M.J. 426, 429 (C.A.A.F. 2004). Although Reynolds dealt with evidence of uncharged misconduct, its three-prong test can apply to evidence of charged misconduct. n2 The test contains the following elements:

> 1. Does the evidence reasonably support a finding by the court members that the appellant committed prior crimes, wrongs or acts?
>
> 2. What "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence?
>
> 3. Is the "probative value . . . substantially outweighed by the danger of unfair prejudice"?

Reynolds, 29 M.J. at 109 (citations omitted).

> N2 In *Huddleston, 485 U.S. at 689*, the Supreme Court concluded that evidence of uncharged acts is admissible if the jury can reasonably conclude that the other acts occurred and that the defendant was the actor. The Supreme Court has applied the Huddleston analysis to evidence of prior charged acts. See *Dowling, 493 U.S. at 348-50*; *Watts, 519 U.S. at 156* (quoting *Dowling, 493 U.S. at 349*). Because Reynolds is consistent with Huddleston, the Reynolds test also applies to prior charged acts.

[**12]

Applying the first prong of the Reynolds analysis to the facts of this case, we conclude that a jury could reasonably find that the prior acts occurred. C.B. testified consistently for over two days that her father had on multiple occasions before June 27 "put his private part inside [her] private part." What distinguishes these other acts from the acts committed on June 27 is the quantum of evidence offered to prove them, not the reliability of C.B.'s testimony. The focus of the Government's case was on the acts occurring on June 27, not the other acts, for it was on June 27 that C.B.'s mother discovered Appellant [*423] in bed with C.B. and her testimony could support C.B.'s.

As for the second Reynolds prong, evidence is relevant under M.R.E. 401 when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M.R.E. 401; *United States v. Berry, 61 M.J. 91, 95 (C.A.A.F. 2005)*. In this case, evidence that Appellant may have engaged in the near identical acts with his daughter in the months prior to June 27 is relevant to the determination [**13] of whether Appellant engaged in similar conduct on June 27.

Applying the M.R.E. 403 balancing test for the third Reynolds prong, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. It was integral to the charged conduct, integral to C.B.'s testimony regarding the events of June 27, and consistent in detail and tenor with the evidence regarding June 27.

Because the members could reasonably find by a preponderance of the evidence that the other prior acts occurred, and the other acts evidence is logically and legally relevant, the members and lower court could properly

consider evidence of carnal knowledge committed before June 27.

Viewing the evidence in the light most favorable to the prosecution, including C.B.'s testimony, the evidence that Appellant was found naked in bed "spooning" C.B. with a partial erection, and the evidence of carnal knowledge committed before June 27, we conclude that a rational trier of fact could have found beyond a reasonable doubt that carnal knowledge occurred on June 27.

B. Administration of the Oath After Testimony

We now turn to Appellant's second claim that his conviction and sentence [**14] should be set aside because the witness oath was administered to C.B. after her first day of testimony was complete.

The first day C.B. was called to testify, trial counsel asked her a series of questions about whether she knew the meaning of telling the truth, and the difference between telling the truth and telling a lie. The following exchange took place:

Q. Do you know what the truth is?

A. Yes

Q. What is the truth?

A. Telling what really happened.

Q. If I told you -- what is a lie? Do you know what a lie is? Tell me what a lie is?

A. Not telling the truth.

Q. Not telling the truth. So if I told you the sky was purple right now, what would that be?

A. A lie.

Q. That would be a lie, right?

At this point, the military judge interrupted the exchange to ask trial counsel to stand a little further from C.B. so that she would speak in a louder voice. After the interruption, trial counsel commenced with C.B.'s direct examination without administering the witness oath. At the end of the direct examination, consisting of nine pages in the record, trial counsel asked C.B. the following:

Q. Why did you say what you said [**15] today?

A. Telling the truth.

Q. You swore that everything you said today was the truth, correct?

A. Yes.

At this point, trial counsel told the military judge there was nothing further, but also stated that "[t]he only thing, sir, if you require me to swear her in, I will. I think we have pretty much covered it, sir. I didn't officially do it." Trial counsel then engaged in the following exchange with C.B.:

Q. [C.B.], your testimony today, was it the truth?

A. Yes.

Q. Was it the whole truth?

A. Yes.

A. Was it nothing but the truth?

Q. Yes.

A. So help you God?

Q. Yes.

[*424] The following day C.B. was recalled to testify. On redirect, trial counsel asked whether C.B. remembered that it was important to tell the truth. C.B. stated that she remembered and testified that she had told the truth the previous day. Defense counsel did not object to the failure to formally swear in C.B. at the beginning of her first day of testimony, at the close of her testimony, or at the outset of her testimony on the second day of trial.

M.R.E. 603 provides: "Before testifying, every witness shall be required to declare that the witness [**16] will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so." M.R.E. 603 "requires that a witness swear or affirm that he will tell the truth," but it "establishes no specific colloquy to be used in carrying out this requirement. Any process that is sufficient to 'awaken the witness's conscience . . .' is satisfactory." *United States v. Allen, 13 M.J. 597, 599*

(A.F.C.M.R. 1982) (quoting Stephen A. Saltzburg, Lee D. Schinasi & David A. Schlueter, Military Rules of Evidence Manual 276 (1981)). As stated in the Drafters' Analysis, M.R.E. 603 is taken without change from the *Fed. R. Evid. 603*. Drafters' Analysis app. 22 at A22-45. The Notes of Advisory Committee on Rules for *Fed. R. Evid. 603*, states that "[t]he rule is designed to afford the flexibility required in dealing with . . . children" and that "[a]ffirmation is simply a solemn undertaking to tell the truth . . . ." As with the *Fed. R. Evid. 603*, M.R.E. 603 requires no special verbal formula, [**17] but instead requires that the oath be meaningful to the witness, including a child witness, and impress upon the witness the duty to tell the truth. See *Allen, 13 M.J. at 599-601*; see *Spigarolo v. Meachum, 934 F.2d 19, 24 (2d Cir. 1991)* ("When children testify, the trial court may fashion an oath or affirmation that is meaningful to the witness.").

Because Appellant did not object to the failure of trial counsel to place C.B. under oath, Appellant waived the issue absent plain error. n3 *United States v. Odom, 736 F.2d 104, 112 (4th Cir. 1984)*; *United States v. Pluta, 176 F.3d 43, 51 (2d Cir. 1999)*; see *United States v. Powell, 49 M.J. 460, 465 (C.A.A.F. 1998)* (in absence of objection, plain error analysis applies). In this context, the rationale for applying waiver is twofold: "First, the defect or failure could have been corrected if a timely objection had been made; second, in the absence of a waiver rule counsel might deliberately avoid objecting to a witness being unsworn in order to have a ground of appeal." *Odom, 736 F.2d at 115*. Under our plain error analysis, Appellant must [**18] show that there was error, the error was plain or obvious, and that the error materially prejudiced his substantial rights. *Powell, 49 M.J. at 463-65*.

n3 We agree with the conclusion of the Court of Criminal Appeals that whether Appellant's absence of objection is considered waiver or forfeiture, the appropriate standard of review is one of plain error. *Washington, 61 M.J. at 576 n.1.* Therefore, we need not and do not address the distinction between forfeiture and waiver in this case.

There is no doubt that the failure to administer the oath before C.B.'s testimony was error, and that the error was obvious. The plain text of M.R.E. 603 required C.B., by oath or affirmation, to declare that she would testify truthfully "before testifying." The initial colloquy between C.B. and trial counsel fell short of this requirement. However, Appellant's claim fails because he cannot show he was materially prejudiced by the error.

Trial counsel asked if C.B. knew the difference between [**19] the truth and a lie, and C.B. indicated that she understood. At the end of her testimony, C.B. stated that she had told the "whole truth" and "nothing but the truth." She then swore that everything she said had been the truth. When C.B. was recalled, she also stated that she only told the truth the previous day. Although the colloquy between trial counsel and C.B. was not a formal oath or affirmation, C.B. demonstrated she understood her duty to tell the truth. In short, consistent with the purpose of M.R.E. 603, but not its temporal requirement, the record of trial reveals that C.B. was alert to the necessity of telling the truth [*425] both at the beginning of her testimony and at the outset of the second day of her testimony.

Appellant counters that while C.B. may have been aware of her obligation to tell the truth, she was not aware of the consequences of failing to do so, a requirement Appellant

derives from the language of M.R.E. 603 regarding "duty" and the general knowledge possessed by most adults that those who lie on the witness stand may be subject to perjury. In addressing this argument, we need not reach beyond the confines of this case. The law is clear, both in the text [**20] of M.R.E. 603 and its analysis, and in federal circuit case law. A particular formula is not required in administering an oath or affirmation, although adherence to the benchbook formula will minimize dispute. This is particularly true in the case of children, where oaths and affirmations may be specially tailored to impress on the particular child the importance of telling the truth. This can be accomplished, as it has been accomplished for many years, without imparting to the child the perils of perjury.

For these reasons, Appellant has not shown that the error prejudiced his substantial rights.

DECISION

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

APPENDIX B

UNITED STATES v. Keith B. WASHINGTON, Staff Sergeant (E-6), U.S. Marine Corps

NMCCA 200101011

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

61 M.J. 574; 2005 CCA LEXIS 162

May 18, 2005, Decided

SUBSEQUENT HISTORY: Later proceeding at *United States v. Washington, 62 M.J. 211, 2005 CAAF LEXIS 994 (C.A.A.F., 2005)*
Review granted by *United States v. Washington, 62 M.J. 451, 2006 CAAF LEXIS 120 (C.A.A.F., 2006)*
Affirmed by *United States v. Washington, 2006 CAAF LEXIS 1060 (C.A.A.F., Aug. 9, 2006)*

PRIOR HISTORY: [**1] Sentence adjudged 30 June 2000. Military Judge: A.W. Keller, Jr. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Aircraft Wing, U.S. MarForLant, Cherry Point, NC.

COUNSEL: Capt JAMES VALENTINE, USMC, Appellate Defense Counsel.

LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel.

JUDGES: BEFORE C.L. CARVER, D.A. WAGNER, R.W. REDCLIFF. Senior Judge CARVER and Judge REDCLIFF concur.

OPINION BY: WAGNER

OPINION: [*575] WAGNER, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of carnal knowledge and indecent acts with a child, in violation of Articles 120 and 134, Uniform Code of Military Justice, *10 U.S.C. § § 920* and *934*. The appellant was sentenced to a bad-conduct discharge, confinement for 9 years, and reduction to pay grade E-1. There was no pretrial agreement. The convening authority approved the sentence as adjudged.

The appellant contends that the findings must be set aside because a key Government witness was not administered an oath or its equivalent prior to testifying, that the evidence adduced at trial was legally and factually insufficient [**2] to sustain his conviction for both offenses, and that the sentence is inappropriately severe for the offenses of which he stands convicted. The appellant also asserts that the Government failed to exercise due diligence when it waited two years to bring the appellant to trial, that the trial defense counsel's failure to submit matters in clemency to the convening authority amounted to ineffective assistance of counsel, and that the military judge erred by not consolidating the offenses for findings purposes at trial.

After carefully considering the record of trial, the appellant's assignments of error, the Government's response, and the appellant's reply, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *Arts. 59(a)* and *66(c), UCMJ.*

Failure to Administer Oath

The appellant contends that this court should dismiss the findings of guilty because the victim, "C," the appellant's 10-year-old daughter, was not placed under oath before her initial testimony at trial. We disagree and decline to grant relief.

C was called to the stand and answered several questions [**3] regarding truth and falsity, but, after being interrupted by the military judge, the trial counsel never completed the inquiry. Following C's testimony on direct examination, the trial counsel asked C if her testimony was the truth and then swore her to that testimony. The defense counsel, who raised no objection to the form of the oath or the procedure of the direct testimony, conducted an extensive cross-examination. The following day, C was recalled by the trial counsel, was once again properly sworn, and testified in amplification of her prior testimony.

MILITARY RULE OF EVIDENCE 603, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), requires that, before testifying, a witness "shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so." The rule was written in this fashion "to permit atheists, conscientious objectors, children, and individuals with emotional difficulties to satisfy the basic criterion."

STEPHEN A. SALTZBURG, ET AL., MILITARY RULES OF EVIDENCE MANUAL, § 603.02 (5th ed. 2003).

The language of MIL. R. [**4] EVID. 603 recognizes the trend in federal civilian courts and military courts toward allowing all witnesses to testify and allowing the members to receive all arguably reliable evidence and decide for themselves what weight each piece of evidence is to be given. *United States v. Morgan, 31 M.J. 43, 47* (1990 C.M.A.)(citing SALTZBURG, MILITARY RULES OF EVIDENCE MANUAL 492 (2nd ed. 1986)); *see also United States v. Lightly, 677 F.2d 1027, 1028 (4th Cir. 1982).*

Assuming without deciding that, under the circumstances of this case, the aborted truth or falsity inquiry with C prior to taking her direct testimony was insufficient to satisfy MIL. R. EVID. 603, we conclude that the appellant forfeited the issue on appeal by his [*576] failure to raise the issue at trial. n1

n1 We purposely apply the doctrine of forfeiture in this case as opposed to the doctrine of waiver, although the result under either would be the same. It could be argued that the appellant affirmatively waived the issue by his silence at trial when both the trial counsel and the military judge addressed the issue with C in the presence of the appellant and his trial defense counsel. The trial judge stopped short of obtaining an express waiver from the appellant on the record, however, and the doctrine of forfeiture appears to us to be more applicable in this case.

[**5]

The military courts have had the opportunity to address the sufficiency of the oath administered to child witnesses, but have not directly addressed the issue of not having the oath administered at all prior to testimony. *See Morgan, 31 M.J. 43*; *United States v. Allen, 13 M.J. 597 (A.F.C.M.R. 1982).*

Federal courts, however, have addressed the issue directly and repeatedly, applying the doctrine of waiver n2 when no objection is made at trial.

> It is well settled that the swearing of a witness is waived by failure to raise the point during the witness' testimony, thus denying the trial court an opportunity to correct what has been characterized as an "irregularity." The rationale of this principle was declared a century and a half ago in the oft-cited case of *Cady v. Norton, 31 Mass. 236, 14 Pick. 236, 237 (Mass. 1833).* The Court in that case stated two justifications for the rule: First, the defect or failure could have been corrected if a timely objection had been made; second, in the absence of a waiver rule counsel might deliberately avoid objecting to a witness being unsworn in order to have a ground of appeal.

United States v. Odom, 736 F.2d 104, 114-15 (4th Cir. 1984). [**6] (footnote omitted) The *Odom* court cites *Wilcoxon v. United States, 231 F.2d 384, 386-387 (10th Cir. 1956)* as the "leading federal case" applying the waiver principle laid down in *Cady.*

n2 Federal cases in this area use the term waiver to include both affirmative waiver of the issue at trial and forfeiture of the issue by failure to raise the issue at trial. For a concise discussion of the difference between the doctrines, see *United States v. Olano, 507 U.S. 725, 733, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993).*

The facts in *Wilcoxon* bear out a similar application of the waiver doctrine in the case before us. In that case, witnesses who spoke no English were given the oath *en masse* with other witnesses, in English, prior to their testimony. No objection was lodged at trial. After trial, Wilcoxon's attorneys alleged that they did not discover the error until after trial. The court in *Wilcoxon* stated that the appellant and his attorneys knew the witnesses spoke no English and were under a duty [**7] to "take notice of the several steps in the proceeding." *Wilcoxon, 231 F.2d at 387* (citing *People v. Krotz, 341 Ill. 214, 172 N.E. 135 (Ill. 1930)).* The court went on to conclude that the appellant's failure to "bring the matter to the attention of the trial court in some manner" constituted waiver of the issue on appeal. *Id.* (citing *Beausoliel v. United States, 107 F.2d 292 (D.C.-Cir. 1939).*

We conclude that the failure of the appellant in the present case to raise, at trial, the issue of sufficiency of the oath given to C, or to lodge objection to the procedure used to satisfy MIL. R. EVID. 603, forfeits the issue on appeal.

Having applied the doctrine of forfeiture vice waiver in this case, we must further determine whether the failure to give a complete oath prior to direct testimony constituted plain error. In doing so, we apply the three-part test set out in *United States v. Powell, 49 M.J. 460, 464-65 (C.A.A.F. 1998)*: (1) whether there was error; (2) whether the error was

plain or obvious; and (3) whether any prejudice resulted from the error. The failure of the trial counsel to administer a complete oath or affirmation [**8] prior to the direct testimony of C was error, but, in our judgment, not plain or obvious under the circumstances of this case. We also find no prejudice suffered by the appellant as a result of the manner in which the oath was administered, in light of the extensive cross-examination following administration of the oath and the witness's subsequent testimony under oath upon recall. We therefore decline to grant relief.

Even assuming, *arguendo*, that the issue was not forfeited by the appellant's silence at trial, we still would find no error under the [*577] circumstances of this case. Here, the witness was asked if she understood the difference between truth and falsehood prior to her direct testimony. She was sworn to that direct testimony prior to cross-examination and asked if her prior testimony was accurate. Also, she was properly sworn again when recalled for additional testimony later in the trial. Under these circumstances, this court is satisfied that the witness was testifying under an oath sufficient to "awaken the witness's conscience and impress the victim's mind with the duty" to testify truthfully. MIL. R. EVID. 603. Therefore, we decline to grant relief.

Legal and [9] Factual Sufficiency**

The appellant contends that the evidence was both legally and factually insufficient to sustain his conviction for carnal knowledge and indecent acts with a child. We disagree.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)*; *United States v. Turner, 25 M.J. 324, 325, (C.M.A. 1987)*;

United States v. Reed, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), aff'd, 54 M.J. 37 (C.A.A.F. 2000); see also Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner, 25 M.J. at 325; see also Art. 66(c), UCMJ.*

In this case, the appellant's averments on appeal are nothing more than a restatement of the arguments made by trial defense counsel at the close [**10] of the case on the merits regarding the length of time between the alleged incidents and the beginning of trial, the number of interviews that the child witness had undergone, the improbability that the acts occurred at all based on the physical evidence or lack thereof, and the inconsistencies in the testimony of the child witness and her mother. The appellant further asserts that there was no evidence presented at trial regarding vaginal penetration on the morning of the alleged incident.

A careful reading of the record of trial discloses that sufficient evidence of each and every element of both offenses was presented to the members through testimony and other evidence adduced at trial. C testified that the appellant had touched her "private parts" on more than one occasion prior to, or on the morning of, the alleged incident. She further testified that he had, on a number of those occasions, placed his "private part" inside her "private part," referring to the groin area of the male and female anatomy. The appellant's wife testified that, on the morning of the incident, she found the appellant in bed and under the bed covers with C, with his penis exposed and partially erect. [**11] She further testified that C was nude, with her

underwear lying at the foot of the bed, and that the appellant was lying in a "spooned" position with C. Additional testimony from the appellant's mother-in-law corroborated the timeline and general account of the events of that morning.

The defense, at trial, attempted to discredit the testimony of the three principal Government witnesses through cross-examination focused on a suggested motive to fabricate and minor inconsistencies between their testimony and prior statements. The defense also presented expert testimony regarding the issue of fabrication in child witnesses through suggestive reinforcement during repeated interviews prior to trial. The members heard all the testimony and received all the evidence, asking numerous questions of their own during the course of the trial.

The court is convinced beyond a reasonable doubt, based on the evidence presented at trial, of the appellant's guilt of both the offense of carnal knowledge and the offense of indecent acts with a child. Therefore, we decline to grant relief.

Sentence Severity

The appellant claims that his sentence consisting of a bad conduct discharge, confinement [**12] for 9 years, and reduction to pay grade E-1, is too severe in light of the offenses for which he stands convicted. After reviewing [*578] the entire record, we find that the sentence is appropriate for this offender and his offenses. *See United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988); United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982).* We therefore decline to grant relief.

Remaining Assignments of Error

We have reviewed each of the appellant's remaining assignments of error and find them lacking in merit.

Conclusion

Accordingly, we affirm the findings and sentence approved by the convening authority.

Senior Judge CARVER and Judge REDCLIFF concur.